No. 14,620

IN THE

United States Court of Appeals

For the Ninth Circuit

SIDNEY HING LOWE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court for the District of Hawaii, Petition No. 15,432.

BRIEF FOR APPELLEE.

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Subject Index

Table of Authorities Cited

Cases

Statutes

Miscellaneous

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BRIEF FOR APPELLEE.

PRELIMINARY STATEMENT.

It has been noted by Appellee that Brief for Appellant does not conform to Rule 18, Rules of the United States Court of Appeals for the Ninth Circuit. Rather than formally raising the question by a motion in this court, Appellee has included in his brief the statutes and treaties involved. Further, Appellant has failed to specify errors to be relied upon, consequently, Appellee has been guided by that portion of Appellant's brief headed "Questions Presented", and by Statements of Points to be Relied Upon on Appeal (R. 20). It is called to the atten-

tion of the court that Appellant has, in his Statement of Points, relied on alleged errors committed by the trial court in granting a Motion to Dismiss the Petition for Naturalization in this case. It is further noted that in point 1 it is stated that "his change of status from a visitor to a treaty merchant administratively in 1924, attributed to him permanent residence for the purpose of naturalization". The date 1924, as set forth in the printed record, is incorrect. Apparently the date should be 1928.

It is now drawn to the attention of the court that in this hearing a Motion to Dismiss was made (R. 14) and was granted with leave to amend (R. 16), and the Petition, as amended, was denied (R. 18, 8-9). It seems also apparent that Appellant is relying only on the granting of the Motion to Dismiss, with leave to amend.

I. STATEMENT OF PLEADING AND FACTS DISCLOSING JURISDICTION.

Appellee agrees with Appellant's statement of jurisdiction but adds the following:

1. The District Court had jurisdiction under 8 USC Section 1421;

2. The Petition for Naturalization, No. 15,432, was filed on July 1, 1954 under 8 USC Section 1427 in the United States District Court for the District of Hawaii (R. 3-8).

II. STATEMENT OF THE CASE.

Petitioner-Appellant filed a Petition for Naturalization on July 1, 1954 (R. 8). A Motion to Dismiss the Petition (R. 14) was made in open court and was granted with leave to amend (R. 16), and the Amended Petition was denied on November 15, 1954 (R. 18, 8-9). The question of lawful admission for permanent residence was raised by the Motion to Dismiss (R. 14) and by the grounds for opposition to the Petition (R. 14, 16, 17, 18).

III. STATUTES AND TREATIES INVOLVED.

Section 1421, Title 8, *United States Code:*

> "(a) Exclusive jurisdiction to naturalize persons as citizens of the United States is conferred upon the following specified courts: . . . District Courts of the United States for the Territories of Hawaii and Alaska . . .
>
> "(d) A person may be naturalized as a citizen of the United States in the manner and under the conditions prescribed in this subchapter, and not otherwise."

Section 1427, Title 8, *United States Code:*

> "(a) No person, except as otherwise provided in this subchapter, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing his petition for naturalization has resided continuously, *after being lawfully admitted for permanent residence,* within the United States for at least five years and during the five years immediately preceding the date of filing

his petition has been physically present therein for periods totaling at least half of that time, and who has resided within the State in which the petitioner filed the petition for at least six months, . . ." (Emphasis supplied).

Section 1429, Title 8, *United States Code:*

"Except as otherwise provided in this subchapter, *no person shall be naturalized unless he has been lawfully admitted to the United States for permanent residence in accordance with all applicable provisions of this chapter.* The burden of proof shall be upon such person to show that he entered the United States lawfully, and the time, place, and manner of such entry into the United States, . . ." (Emphasis supplied).

Treaty of 1880 between the United States and China:

"Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights and privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nation." 22 Stat. 826, 827.

Section 3 of the *Immigration Act of 1924* states in part:

"When used in this Act the term 'immigrant' means any alien departing from any place outside the United States destined for the United States, except . . . (6) An alien entitled to enter

the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce in navigation . . ."

Section 13(c) of the *Immigration Act of 1924* states in part:

"(c) No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a nonquota immigrant under the provisions of subdivisions (b), (d), or (e) of section 4, or (2) is the wife, or the unmarried child under 18 years of age, of an immigrant admissible under such subdivision (d), and is accompanying or following to join him, (3) is not an immigrant as defined in section 3, . . ."

Section 28(c) of the *Immigration Act of 1924* states:

"(c) The term 'ineligible to citizenship,' when used in reference to any individual, includes an individual who is debarred from becoming a citizen of the United States under section 2169 of the Revised Statutes, or under section 14 of the Act entitled 'An Act to execute certain treaty stipulations relating to Chinese,' approved May 6, 1882, or under section 1996, 1997, or 1998 of the Revised Statutes, as amended, or under section 2 of the Act entitled 'An Act to authorize the President to increase temporarily the Military Establishment of the United States,' approved May 18, 1917, as amended or under law amendatory of, supplementary to, or in substitution for, any such sections."

IV. QUESTION PRESENTED.

Did the Petitioner-Appellant acquire by his original entry, or any subsequent action taken by him, lawful admission for permanent residence?

V. ARGUMENT.

SUMMARY OF ARGUMENT.

Appellant was admitted as a visitor on January 29, 1926, under Sections 3(2) and 13(c) of the Immigration Act of 1924, and was permitted to change his status to that of a treaty merchant in 1928, under Section II of the Treaty of 1880 with China, as amended and changed by Sections 3(6), 13(c), and 28(c) of the Immigration Act of 1924. Under either one of these statuses, he was not admitted as an "immigrant" (Sec. 3, Imm. Act of 1924), and consequently not admitted for permanent residence.

Entry prior to the 1924 Act.

The entry of a treaty merchant prior of the effective date of the Immigration Act of 1924 was held to be an entry for permanent residence. *Ex parte Goon Dip,* D.C.W.D.Wash. 1924, 1 F.(2d) 811; *Wong Sun Fay v. United States,* 9 Cir. 1926, 13 F.(2d) 67; *Haff v. Yung Poy,* 9 Cir. 1933, 68 F.(2d) 203; *In re Chi Yan Cham Louie,* D.C.W.D.Wash. 1946, 70 F.Supp. 493; *Petition of Wong Choon Hoi,* D.C.S.D.Cal. 1947, 71 F.Supp. 160.

The 1924 Act did modify and abrogate parts of the 1880 Treaty.

The 1924 Act provided that the word "immigrant" means any alien departing from any place outside the United States destined for the United States except

> ". . . (2) an alien visiting the United States temporarily, as a tourist or temporarily for business or pleasure . . . (6) an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce in navigation . . ." (Sec. 3, Imm. Act of 1924).

These two portions of Section 3 cover the case of Sidney Hing Lowe. He was admitted as a visitor and changed his status to that of a treaty merchant (R. 4, 14, 15, 16) under the Treaty of 1880, as superseded by the Immigration Act of 1924. Appellant changed from one temporary status to another.

It is here that Appellant and Appellee part company.

> "The authorities are in agreement that treaty merchants entering subsequent to the Naturalization and Immigration Act of 1924 are limited in their privileges while here by the terms of that Act. They also show that the courts, in subsequent decisions, do not regard the Weedin case, supra, as holding that the treaties between China and the United States preclude Congressional action limiting the privileges of a treaty merchant who enters subsequent to such enactments. They also clearly show that Congressional enactments supersede treaty provisions inconsistent with them. See Moser v. United States, 1951, 341 U.S. 41, 71 S.Ct. 553, 95 L.Ed. 729; and

Clark v. Allen, 1947, 331 U.S. 503, 67 S. Ct. 1431, 91 L.Ed. 1633, 170 A.L.R. 953; Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd., 1934, 291 U.S. 138, 54 S.Ct. 361, 78 L.Ed. 695; Head Money Cases (Edye v. Robertson), 1884, 112 U.S. 580, 5 S.Ct. 247, 28 L.Ed. 798."

United States v. Kwan Shun Yue, 9 Cir. 1952, 194 F.(2d) 225, 227.

Section 13(c) of the *Immigration Act of 1924* throws considerable light upon the subject. It states in part:

"No alien ineligible to citizenship shall be admitted to the United States unless such alien . . . (3) is not an immigrant as defined in section 3."

This section clearly limits right of residence, to maintaining status as a nonimmigrant, to treaty merchants and clearly puts at an end any right to permanent residence formerly acquired under the treaty. Treaty merchants, since the effective date of the 1924 Act, acquire only a temporary status as a nonimmigrant. *United States v. Kwai Shun Yue, supra.*

The theory of relation back before July 1, 1924, the effective date of the 1924 Act.

The prime example of such theory is admission, after the effective date of the Immigration Act of 1924, as permanent residents, of wives and children of treaty merchants who were *admitted prior to the effective date of the 1924 Act.* "Such holding seems to be based upon the American conception of unity

of the family." (and authorities cited) *United States v. Kwai Shun Yue, supra,* at page 227.

A further extension of this theory is found in *United States v. Kwai Tim Tom,* 201 F.(2d) 595, where a Chinese laborer's entry to the United States at annexation of Hawaii (1898), was the date to which his change of status was related. By the theory or relation behind the 1924 Act, again the full effect of the unamended 1880 Treaty was given to his treaty merchant status, and this court found he had acquired a status as a permanent resident and, hence, was eligible for naturalization.

The applicability of United States v. Kwai Tim Tom to this case.

It is the position of the Appellee, as partially set forth above, that the *Kwai Tim Tom* case is no more than one of a long line of precedent in which the entry of the person involved is related to some date prior to the effective date of the *1924* Act, July 1, 1924.

In some respects the facts of *Kwai Tim Tom* are very similar to this case. *Kwai* administratively changed his status to that of treaty merchant in 1928, just as did Appellant. No entry was made at the time of change of status. However, *Kwai* was able to relate his change of status back to the annexation of the Hawaiian Islands. *U. S. v. Kimi Yamamoto,* 9 Cir. 1917, 240 Fed. 390.

In the instant case, Appellant can only relate his entry back to 1926, to his first entry, admission, or coming to the United States as a visitor under the

Treaty of 1880 with China as superseded by the Immigration Act of 1924.

It is the view of Appellee that the *Kwai Tim Tom* case, *supra,* is not precedent for, nor does it support the contention of Appellant in this case.

Treaty merchant status is temporary.

A treaty merchant status acquired after the effective date of the 1924 Act, and which cannot be related back to an entry prior to the effective date, is a temporary status as distinguished from one of permanent residence (*U. S. v. Kwan Shun Yue, supra; U. S. v. Kwai Tim Tom, supra;* Sections 3, 13(c), 28, *Immigration Act of 1924,* 43 Stat. 153).

Lawful admission for permanent residence prerequisite to naturalization under Immigration and Nationality Act of 1952.

Appellant filed his petition for naturalization under Section 1427, Title 8, United States Code (R. 3). Appellant must have been admitted for permanent residence to be eligible for naturalization (8 USC Sections 1427 and 1429).

VI. CONCLUSION.

There is only one real issue involved here. That is, did the Appellant acquire a status as a permanent resident. We think he entered in 1926 as a visitor under the Immigration Act of 1924, as it modified the Treaty of 1880 with China, and changed his status in 1928 to a treaty merchant under the Immi-

gration Act of 1924, as it modified the Treaty of 1880. We think the treaty was modified by the Immigration Act of 1924 to make this treaty merchant status that of a nonimmigrant. He cannot relate his entry behind the effective date of the 1924 Act; he can only relate it back to his original entry in 1926, at a time which is subsequent to and controlled by the 1924 Act. Consequently, he has no status as an immigrant, and no lawful entry for permanent residence, as is required for his naturalization.

Dated, Honolulu, T. H.,
May 31, 1955.

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